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What Will the Future Hold for the Independent Counsel Statute?

A botched burglary attempt that occurred more than twenty-five years ago has affected every presidential administration since that time.¹ The attempted cover-up of the break-in at the Watergate building and the affairs following what has come to be known as the Saturday Night Massacre² led to the enactment of the Ethics in Government Act of 1978,³ which included a provision creating the position of independent counsel.⁴ Since the statute went into effect, twenty independent counsels have been appointed,⁵ and more than \$136 million in public money has been expended in the course of their efforts.⁶ As Professor Beth Nolan has observed, "During the first eight years of the Act, until May 1986, only four independent counsels were appointed."⁷ Currently, there are

1. On June 17, 1972, a group of burglars was apprehended breaking into Democratic National Committee offices in the Watergate building in Washington, D.C. Thomas M. DeFrank and Mark Mooney, with Dave Saltonstall, *Watergate Legacy Enduring*, DAILY NEWS (New York), June 15, 1997, at 28.

2. Sixty-seventh Judicial Conference of the Fourth Circuit, *The Independent Counsel Process: Is It Broken and How Should It Be Fixed?*, 54 WASH. & LEE L. REV. 1515, 1521 n.4 (1997). As the investigation into the Watergate affair intensified, then-Attorney General Elliot Richardson created the Office of Watergate Special Prosecutor under the authority of the Department of Justice. As part of his investigation, the Watergate Special Prosecutor, Archibald Cox, subpoenaed materials, including the infamous tapes, which were being held by President Richard Nixon. When he learned of Cox's request, President Nixon directed Attorney General Richardson to dismiss Cox. The Attorney General would not carry out the instruction and resigned. Deputy Attorney General William French Smith followed suit when the President instructed him to fire the Watergate Special Prosecutor. Finally, Robert Bork, the Solicitor General and Acting Attorney General, fired Archibald Cox. *Id.*

3. 28 U.S.C. §§ 591-99 (1998).

4. Sixty-seventh Judicial Conference of the Fourth Circuit, *The Independent Counsel Process: Is It Broken and How Should It Be Fixed?*, *supra* note 2, at 1521. The version of the act currently in effect is the Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732 (1994).

5. Bill Miller, *Counsels Have Spent \$62 Million Investigating Administration*, THE WASHINGTON POST, October 1, 1998, at A21.

6. A.B. Stoddard, *Congress Rethinks Independent Counsel Law*, THE HILL, Feb. 11, 1998, at 1 (citing U.S. Rep. Jay Dickey (R-Ark.)). Spending information pertaining to outlays by independent counsels are necessarily dated, because these figures are released only every six months by the Government Accounting Office. Miller, *supra* note 5, at A21.

7. Beth Nolan, *Removing Conflicts from the Administration of Justice: Conflicts of Interest and Independent Counsels Under the Ethics in Government Act*, 79 GEO. L.J. 1, 18 (1990).

five ongoing inquiries.⁸

The framers of the Constitution of the United States made no provision for the office of the independent counsel or any similar position, although they were keenly aware that there must be some check on the powers of the President.⁹ In the nearly two hundred years that preceded the enactment of the statute, no fixed procedure existed by which the President or other high-level executive officials could be investigated and, if necessary, prosecuted.¹⁰ What has changed in our republic to have made the independent counsel such a regular part of the political scene in this era? Although the theories available to explain how we reached the current state of politics and society are as numerous as the pundits who espouse them, in the case of the independent counsel statute, the explanation is likely a combination of politics and public perception.

To properly understand how and why the Ethics in Government Act came to pass, it is necessary to recall its historical context.¹¹ In 1978, the American psyche was still badly bruised from the Watergate scandal.¹² At the time, Congress determined that the citizens of the United States should be given reason to comfortably believe that any allegation of misconduct at the highest levels within the executive branch of the government would be fully and objectively investigated.¹³ According to one view, Congress believed that neither it nor the public could be assured that officials within the Department of Justice would act in the sole interest of justice in investigating certain matters involving administration officials.¹⁴ One result of this lack of confidence was the enactment of the Ethics in Government Act.¹⁵ Included within the Ethics in Government

8. Miller, *supra* note 5, at A21. Arlin M. Adams and Larry D. Thompson are investigating issues concerning the Department of Housing and Urban Development during the Reagan administration; Kenneth W. Starr is investigating the Whitewater and Monica Lewinsky matters; Donald C. Smaltz is investigating Mike Espy; David Barrett is investigating Henry Cisneros; and Carol Elder Bruce is investigating Bruce Babbitt. *Id.*

9. See generally, THE FEDERALIST NOS. 47, 48 (James Madison).

10. Sixty-seventh Judicial Conference of the Fourth Circuit, *The Independent Counsel Process: Is It Broken and How Should It Be Fixed?*, *supra* note 2, at 1520.

11. Senator Carl Levin & Elise J. Bean, *A Symposium on Special Prosecutions and the Role of the Independent Counsel: The Independent Counsel Statute: A Matter of Public Confidence and Constitutional Balance*, 16 HOFSTRA L. REV. 11 (1987).

12. *Id.* at 13.

13. Sixty-seventh Judicial Conference of the Fourth Circuit, *The Independent Counsel Process: Is It Broken and How Should It Be Fixed?*, *supra* note 2, at 1521.

14. Nolan, *supra* note 7, at 10-11.

15. Sixty-seventh Judicial Conference of the Fourth Circuit, *The Independent Counsel Process: Is It Broken and How Should It Be Fixed?*, *supra* note 2, at 1521. During reauthorization debate, a later Congress declared the following purpose for the act:

to ensure that a fair, impartial, and thorough investigation is conducted into all criminal allegations against senior government officials; to ensure continuing

Act is the independent counsel statute, which, by its terms, must be reauthorized by Congress every five years.¹⁶ The present version of the independent counsel law will expire on June 30, 1999.¹⁷

The Attorney General is responsible for enforcing the statute, which applies to government officials in two categories.¹⁸ The President and Vice President, cabinet-level officials within the executive branch,¹⁹ certain high-level executive staff offices, Assistant Attorneys General or certain other high-ranking officials at the Justice Department, the Director and Deputy Director of the Central Intelligence Agency, the Commissioner of the Internal Revenue Service, and the chairman and treasurer of the President's political campaign committee all fall under the first category.²⁰ When the Attorney General receives information "sufficient to constitute grounds to investigate" whether an individual within this category "may have violated any federal criminal law," she is obligated to conduct a preliminary investigation.²¹

The second category under the independent counsel statute includes individuals regarding whom the Attorney General determines a real or perceived conflict of interest may exist.²² A conflict of interest is deemed to be present where a political, personal, or financial conflict would result from an investigation or prosecution conducted by the Justice Department.²³ In such cases, the Attorney General may, at her dis-

public confidence in our democratic system and to protect the Executive Branch from unwarranted suspicion; to insulate the investigation suspicion; to insulate the investigation of senior officials from personal or political influence and therefore to ensure that its conclusion will have the fullest credibility; and to afford protection to the reputation of any person subject to investigation, precisely because the independent counsel's investigation is independent and credible.

Nolan, *supra* note 7, at 15 (citing H.R. REP. NO. 316, 100th Cong., 1st Sess. 25, 11 (1987)).

16. 28 U.S.C. § 599 (1998); see also Sixty-seventh Judicial Conference of the Fourth Circuit, *The Independent Counsel Process: Is It Broken and How Should It Be Fixed?*, *supra* note 2, at 1521.

17. 28 U.S.C. § 599 (1998); see also Sixty-seventh Judicial Conference of the Fourth Circuit, *The Independent Counsel Process: Is It Broken and How Should It Be Fixed?*, *supra* note 2, at 1521.

18. 28 U.S.C. § 591(b) and (c) (1998).

19. The Cabinet consists of the secretaries of each of the departments within the executive branch. The executive departments are the Departments of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Housing and Urban Development, Interior, Justice (in this case the attorney general), Labor, State, Transportation, Treasury, and Veterans Affairs. OFFICE OF THE FEDERAL REGISTER, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, *THE UNITED STATES GOVERNMENT MANUAL* 1998/99, at 89.

20. 28 U.S.C. § 591(b) (1998). In total, seventy-five officials in the executive branch come under the statute's provisions. Stoddard, *supra* note 6, at 1.

21. 28 U.S.C. § 591(a) (1998). Note that this section provides an exception when the act would be classified as an infraction or a class B or C misdemeanor. *Id.*

22. *Id.* at § 591(c)(1).

23. *Id.*

cretion, begin a preliminary investigation as to whether a request to appoint an independent counsel is appropriate.²⁴

If the Attorney General launches such a preliminary investigation into the possible violation of federal criminal law, that investigation must comply with several significant restrictions.²⁵ In conducting an investigation, the Attorney General may not use such common prosecutorial tools as grand juries, subpoenas for material or testimony, grants of immunity for witnesses, or plea bargains.²⁶ Once the initial inquiry is complete, relying on evidence gathered without the benefit of these devices, the Attorney General must petition the special division of the United States Court of Appeals for the District of Columbia²⁷ for the appointment of an independent counsel, unless the Attorney General determines that "there are no reasonable grounds to believe that further investigation is warranted."²⁸ If the Attorney General determines that there are no reasonable grounds to continue an investigation, she must notify the special division of the court that she will not be seeking an independent counsel and provide the court with a report describing the information made available to the Justice Department and the findings of her investigation.²⁹ The Attorney General's decision not to seek the appointment of an independent counsel is not reviewable by the court panel.³⁰

In cases involving individuals identified in the mandatory section of the statute,³¹ if the findings of the investigation do not conclusively demonstrate that there are no reasonable grounds to continue an investigation, the Attorney General must request that the court appoint an independent counsel to investigate the matter.³² The special division will then appoint an independent counsel and define the counsel's jurisdic-

24. *Id.* The Attorney General may also conduct a similar preliminary investigation of a member of Congress if she determines such an investigation is "in the public interest." *Id.* at § 591(c)(2).

25. *Id.* at § 592(a)(2).

26. 28 U.S.C. § 592(a)(2)(A) (1998).

27. *Id.* at § 592(c). The independent counsel statute creates a separate section of the United States Court of Appeals for the District of Columbia to appoint independent counsels, define their jurisdiction and administer several other functions. *Id.* at § 593. The special division is comprised of three judges appointed by the Chief Justice of the Supreme Court, each of whom serves for a term of two years. *In the Matter of a Charge of Judicial Misconduct or Disability*, 39 F.3d 374, 376 (D.C. Cir. 1994).

28. 28 U.S.C. § 592(b)(1) (1998).

29. *Id.* at § 592(b)(1) and (2).

30. *Id.* at § 592(b)(1).

31. *Id.*

32. *Id.* at § 591(c)(1).

tion.³³

Once appointed, an independent counsel has nearly all of the authority possessed by the Attorney General and can use a range of prosecutorial tools to conduct a full investigation into the subject or individual under investigation.³⁴ The only limit on an independent counsel is the extent of the jurisdiction granted by the court, and the only obligation of an independent counsel is to submit periodic reports concerning the investigation.³⁵ Provided the independent counsel follows these directives, it is virtually impossible to remove him from his position until the investigation is completed.³⁶

Congress carefully drafted the independent counsel statute to provide the independent counsel with the greatest degree of autonomy possible, thereby hoping to avoid any attempt on the part of the chief executive to repeat the tactics employed by President Nixon when he felt Archibald Cox's investigation was moving in a direction that was harmful to his presidency.³⁷ Such careful legislative drafting has also led to some unanticipated consequences, as evidenced by the numerous amendments made to the statute over its history.³⁸ Even in its amended form, there was insufficient support of the statute to muster the votes necessary to renew the legislation in 1992.³⁹ The statute was revived in 1994, largely due to the strong support offered by a newly-elected President William J.

33. 28 U.S.C. § 593(b)(1) (1998).

34. *Id.* at § 594(a).

35. An independent counsel may seek expansion of his jurisdiction when new information has come to his attention which indicates the possibility of additional criminal activity. In this case, the independent counsel must submit the information to the Attorney General who, after a preliminary investigation, will determine whether a request to the special division of the court for expanded jurisdiction is appropriate. *Id.* at § 593(c)(2)(A) and (C). The independent counsel is required to submit certain administrative reports to the court every six months and a final report on the entire investigation at its conclusion. *Id.* at § 594(h)(1)(A) and (B). In addition, the independent counsel is required to submit an annual report to Congress detailing the investigation to the extent necessary to explain the expenditure of funds (28 U.S.C. § 595(a)(2) (1998)) and to inform the House of Representatives of "substantial and credible information . . . that may constitute grounds for an impeachment." *In re: Bruce Lindsey (Grand Jury Testimony)*, 148 F.3d 1100, 1112 (D.C. Cir. 1994) (citing 28 U.S.C. § 595(c) (1994)).

36. The independent counsel may be removed by the Attorney General "only for good cause, physical or mental disability . . . or any other condition that substantially impairs the performance of such independent counsel's duties." 28 U.S.C. § 596 (a)(1) (1998). The independent counsel may also be discharged by impeachment and conviction. *Id.*

37. Sixty-seventh Judicial Conference of the Fourth Circuit, *The Independent Counsel Process: Is It Broken and How Should It Be Fixed?*, *supra* note 2, at 1522 n.4.

38. The act was amended in 1983, 1984, 1987 and 1994. See, 28 U.S.C.A. § 591 (1993 and Supp.1998).

39. The statute expired in 1992 as then-Senate Minority Leader Bob Dole used parliamentary procedures to keep the legislation from being renewed. Amy Keller, *After Reno's Decision, Congress to Revisit Fate of Counsel Statute*, ROLL CALL, Dec. 4, 1997.

Clinton.⁴⁰

The independent counsel statute sought both to assure the citizenry that no one, including high government officials, was above the law and to deter any wrongdoing by those at the top of the executive branch.⁴¹ In addition, the statute aimed to comply with traditional notions within the legal profession regarding conflicts of interest.⁴² In terms of application, the independent counsel statute involves all three segments of our national government.⁴³ The legislative, the executive and the judicial branches, all play a role in the process, along with at least one private attorney.⁴⁴ As may be anticipated when legislation has such broad impact on the operation of government and is the product of compromise, virtually every viewpoint finds fault with some aspect of the final product. The independent counsel statute is a good example of such a piece of legislation.

Until 1988, some of the statute's critics contended that the act was simply unconstitutional.⁴⁵ The United States Supreme Court addressed the constitutionality of the independent counsel statute in *Morrison v. Olson*.⁴⁶ *Morrison* dealt with an independent counsel's investigation of Theodore Olson, a member of the Attorney General's office who allegedly committed perjury when testifying before a congressional committee.⁴⁷ Mr. Olson first contended that the statute violated the Appointments Clause of the Constitution,⁴⁸ which grants the President sole authority to appoint principal officers of the United States.⁴⁹

The Court responded to this argument by categorizing the inde-

40. Susan Page, *Independent Counsel Law: Parties Switch Sides But Both Say It May Be Time For a Change*, USA TODAY, Nov. 14, 1997, at 4A. Five years later, President Clinton believes that the independent counsel has allowed the criminal justice system to be used as a political tool. *Id.*

41. Eric R. Glitzenstein & Alan B. Morrison, A Symposium on *Morrison v. Olson: Addressing the Constitutionality of the Independent Counsel Statute: The Supreme Court's Decision in Morrison v. Olson: A Common Sense Application of the Constitution to a Practical Problem*, 38 AM. U. L. REV. 359, 379 (1989).

42. *Id.*

43. Sixty-seventh Judicial Conference of the Fourth Circuit, *The Independent Counsel Process: Is It Broken and How Should It Be Fixed?*, *supra* note 2, at 1525.

44. *Id.*

45. The argument put forth by the executive branch in *Morrison v. Olson* was that the statute violated Article II of the Constitution, which requires the executive branch to "take Care that the Laws are faithfully executed." Eugene Gressman, A Symposium on *Special Prosecutions and the Role of the Independent Counsel: Introduction*, 16 HOFSTRA L. REV. 1, 5 (1987).

46. 487 U.S. 654 (1988).

47. John M. Kelly & Janet P. McEntee, Note, *The Independent Counsel Law: Is There Life After Death?* 8 ST. JOHN'S J. LEGAL COMMENT. 561, 572 (1993).

48. U.S. CONST. art. II, § 2, cl 2.

49. Kelly & McEntee, *supra* note 47, at 572.

pendent counsel as an inferior office, and as such, was a post that other branches of the government could create and fill.⁵⁰ In reaching this conclusion, the Court noted that the independent counsel can, under some circumstances, be removed by an executive official, the independent counsel's duties and jurisdiction are limited by the statute, and the office is not permanent.⁵¹

Mr. Olson also contended that the independent counsel statute violated the separation of powers doctrine.⁵² Here, the Court concluded that the statute did not violate the separation of powers doctrine because Congress was not seeking to enhance its own power by depriving the President of authority over this executive branch officer.⁵³

Following *Morrison*, there can be no doubt that the independent counsel statute represents a valid constitutional exercise of congressional authority.⁵⁴ However, the holding of the Supreme Court in *Morrison* has not settled many of the other issues that have been raised with respect to the law. In 1997, the United States Court of Appeals for the Fourth Circuit hosted a judicial conference on the state of the current independent counsel statute, at which attendees offered a variety of viewpoints.⁵⁵ Panel participants discussed issues that have arisen in the implementation of the statute in areas such as: (1) the manner of requesting the appointment of an independent counsel; (2) the appointment of an independent counsel by the court; (3) the investigation by the independent counsel; and (4) the role of congressional investigations covering the same area as an independent counsel investigation.⁵⁶

Although many commentators and legislators argue persuasively that modifications should be made to various sections of the statute, much of the consternation caused by the law stems from the procedure set forth for the initial stage of an investigation.⁵⁷ If cases lacking merit could be removed from the process early on, many of the criticisms of the

50. *Id.* at 573 (citing *Morrison*, 487 U.S. at 671-72).

51. *Id.* (citing *Morrison*, 487 U.S. at 671-72).

52. *Id.* at 574 (citing *Morrison*, 487 U.S. at 704 (Scalia, J., dissenting)).

53. *Id.* at 574-75 (citing *Morrison*, 487 U.S. at 686).

54. *Morrison*, 487 U.S. at 696-97.

55. On June 27, 1997, five separate panels discussed issues raised by the independent counsel statute as part of the opening session for the circuit's 67th Judicial Conference. See Sixty-seventh Judicial Conference of the Fourth Circuit, *The Independent Counsel Process: Is It Broken and How Should It Be Fixed?*, *supra* note 2, at 1515.

56. See Sixty-seventh Judicial Conference of the Fourth Circuit, *The Independent Counsel Process: Is It Broken and How Should It Be Fixed?*, *supra* note 2, at 1515.

57. See *id.* at 1528. Statements by former Justice Department official Jamie Gorelick suggest that once the Attorney General initiates a preliminary investigation, "it is often difficult to conclude that no further investigation is warranted." *Id.*

statute could be substantially muted. Unfortunately, the terms of the current statute obligate the Attorney General to seek an independent counsel in all but the most meritless cases.⁵⁸

The process employed to investigate allegations of wrongdoing by a person covered by the statute begins at the Department of Justice.⁵⁹ The Public Integrity Section of the Criminal Division of the Department of Justice has thirty days to determine whether the presented evidence meets the specific and credible standard.⁶⁰ Upon the receipt of "specific and credible evidence" regarding a covered person, the Public Integrity Section begins an inquiry into the matter.⁶¹ According to Jamie Gorelick, formerly with the Department of Justice, this is the stage of the process where the statute's language has its most profound effect.⁶² This is so because the standard by which the Attorney General must decide whether to seek an independent counsel is "whether further investigation is warranted."⁶³ Given this standard, cases that reach the preliminary investigation stage often result in a request for the appointment of an independent counsel.⁶⁴

In discussing the standard imposed on Attorneys General, Former Attorney General William Barr notes:

It is very hard to conceive of a case where you can make that call [that there are no reasonable grounds to investigate further] where you haven't subpoenaed documents and you haven't brought witnesses before the grand jury, you haven't compelled certain people to speak to you, especially when a lot of these allegations have to do with lying. . . . So basically it creates a situation, a dynamic, under which it is virtually impossible, once information comes to you about a covered person, to prevent the naming of an independent counsel because your hands are tied during the investigation phase⁶⁵

Such can be the case in situations where even compelling evidence of the alleged behavior would not be sufficient to trigger prosecution by the Justice Department under normal circumstances.⁶⁶

58. *Id.* at 1530 (statement by William P. Barr, a former United States Attorney General).

59. See 28 U.S.C. § 592 (1998).

60. Sixty-seventh Judicial Conference of the Fourth Circuit, *The Independent Counsel Process: Is It Broken and How Should It Be Fixed?*, *supra* note 2, at 1528.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* The likelihood of an independent counsel appointment is amplified because the statute prohibits the Attorney General from using many of the tools that are considered standard in a prosecutor's investigation. See 28 U.S.C. 592 (a) (2) (1998).

65. Sixty-seventh Judicial Conference of the Fourth Circuit, *The Independent Counsel Process: Is It Broken and How Should It Be Fixed?*, *supra* note 2, at 1530.

66. *Id.*

The statute's requirement dealing with the question of intent, an extremely important aspect of criminal law, further limits the Attorney General's ability to use her own discretion.⁶⁷ Here, although the burden on a criminal prosecutor would be to establish intent beyond a reasonable doubt, the statute requires the Attorney General to seek appointment of an independent counsel unless she can establish a lack of intent by a clear and convincing standard.⁶⁸ Once credible evidence (or what is conceivably credible evidence) that a crime may have been committed by a covered person is brought to the attention of the Attorney General, it is almost certain that an independent counsel will be appointed to investigate the allegations.⁶⁹ Theodore Olson,⁷⁰ formerly the subject of an independent counsel investigation, suggests that, under the statute the situation is "almost like having to prove that you are innocent beyond a reasonable doubt."⁷¹ Although under some circumstances it may be appropriate to hold public officials to a higher standard, it is never appropriate to prosecute such individuals under what is, in essence, a different law.

These issues and others have spawned efforts in both chambers of Congress to alter the independent counsel statute. Republicans, who as a party generally oppose the independent counsel statute, have received some newfound support from their colleagues on the other side of the aisle, particularly in response to Kenneth Starr's investigation of President Clinton.⁷² Representative James Clyburn, a Democrat who voted to renew the statute in 1994, is now on record as being opposed to the law.⁷³ The minority counsel for the House Judiciary Committee, David

67. *Id.* at 1531.

68. *Id.* at 1531-32.

69. Rep. Henry Hyde, Chairman of the House Judiciary Committee, has stated that "mere allegations, assertions, rumor or hearsay" can begin a process that culminates with the appointment of an independent counsel and the undertaking of an investigation with all of the authority and resources provided to the independent counsel by the statute. Scott Shepard, *Investigations . . . or Politics?: Many Believe Changes Overdue in Lengthy, Wide-ranging, Costly Probes*, ATLANTA CONSTITUTION, Apr. 13, 1996, at A10.

70. Theodore Olson was investigated for allegations that he committed perjury before the House Judiciary Committee while he was employed in the Attorney General's Office at the Department of Justice. When an independent counsel was appointed to investigate the allegations, Mr. Olson, brought suit, claiming that the independent counsel statute was unconstitutional. Mr. Olson ultimately lost this argument when the U.S. Supreme Court, in *Morrison v. Olson*, 487 U.S. 654 (1988), declared that the statute did not violate the Constitution. Kelly & McEntee, *supra* note 47, at 572.

71. Shepard, *supra* note 69, at A10.

72. Stoddard, *supra* note 6, at 1. In August of 1994, Kenneth Starr began his investigation into President Clinton's involvement in the Whitewater real estate deal. Shepard, *supra* note 69, at A10.

73. Stoddard, *supra* note 6, at 1. Rep. James Clyburn (a Democrat from South Carolina) now says of his 1994 vote, "I still regret it and will never vote for it again. I think that's a bad law. I

Yassky, contends, "Nobody feels the [independent counsel] law, as it is currently structured, works."⁷⁴ Even Senator Carl Levin, one of the statute's past champions, has offered an extensive plan to revamp the law.⁷⁵

In February 1998, the prevailing view on Capitol Hill was that any debate on the merits of modifying or terminating the independent counsel law should wait until the Starr investigation had been completed.⁷⁶ Senator Fred Thompson, Chairman of the Senate Governmental Affairs Committee, stated that the committee would hold hearings regarding the statute and its future.⁷⁷ Senator Thompson himself seemed pessimistic concerning the renewal of the independent counsel statute.⁷⁸ Considering that Kenneth Starr has indicated that his report to Congress is not the end of his investigation,⁷⁹ Congress may be forced to publicly debate the matter this year while an investigation of the President is still ongoing. That possibility is growing more likely as both the Senator Thompson's Governmental Affairs Committee and the House Judiciary Committee have begun hearings regarding the possible re-authorization of the statute.⁸⁰ With the Starr investigation continuing beyond the Senate

don't know of anybody who can survive an independent prosecutor." *Id.*

74. John Anderson, *Fifteen Months and Counting: The Clock is Running Out on the Independent Counsel Law*, THE AMERICAN LAWYER, Apr. 1998, at 58.

75. *Id.* Senator Levin's proposal calls for: (1) limiting the jurisdiction given to independent counsels; (2) limiting the applicability of the law to allegations of crimes committed either while in federal office or as a candidate for such an office; (3) limiting the budget for each independent counsel investigation; (4) reducing the number of federal officials to whom the statute applies; (5) raising the evidence of criminal wrongdoing threshold that triggers the appointment of an independent counsel; and (6) granting the Attorney General the authority to determine if an independent counsel should serve full-time in the office. *Id.*

76. Stoddard, *supra* note 6, at 1.

77. Amy Keller, *The Last Starr Fighter? Abuse of Authority Controversy Could Spell the End of the Independent Counsel Statute*, ROLL CALL, Mar. 2, 1998, at 10. Senator Thompson has expressed his own concerns about the application of the current law being different than the statute's original intent. On July 22, 1998, Senator Thompson reiterated his personal concerns about the statute to reporters and suggested that Congress earnestly consider eliminating the independent counsel law. Jack Torrey, *End of Independent Counsels?* PITTSBURGH POST-GAZETTE, July 23, 1998, at A6. Senator Thompson's counterpart in the House of Representatives, Chairman of the House Judiciary Committee Henry Hyde, also voiced concern about the law. Congressman Hyde said of the current version of the statute that "mere allegations, assertions, rumor or hearsay" can be enough to invoke the law and appoint an independent counsel to investigate. Shepard, *supra* note 69, at A10.

78. James Toedtman, *The Impeachment Trial / Another Probe Victim / Law Creating Special Prosecutors Expected to Die*, NEWSDAY (New York), Jan. 13, 1999, at A5. Addressing Attorney General Janet Reno's decision not to seek an independent counsel to investigate fundraising associated with President Clinton's campaign, Senator Thompson stated, "This is probably the final nail in the coffin of the independent counsel law."

79. Kevin McCoy, *No Stop Signal for Bill Probe*, NEW YORK DAILY NEWS, Sept. 11, 1998, at 37.

80. Penny Bender, *Lawmakers Debate Reforming, Killing Independent Counsel Act*, Gannett

impeachment trial of President Clinton, several legislators seem content to simply allow the law to lapse.⁸¹ Even supporters of the statute acknowledge that the current political climate and the controversy surrounding Kenneth Starr's investigation "could very well be the beginning of the end for the independent counsel law."⁸²

Members of Congress introduced seven separate bills during the 105th Congress to modify some aspect of the law.⁸³ Representative Robert Wexler introduced perhaps the most noteworthy and far-reaching of these bills.⁸⁴ The Wexler bill proposed: (1) granting the Attorney General subpoena power for preliminary investigations; (2) further limiting

News Service, Mar. 8, 1999.

81. Judy Keen, *Time to Move On, Lawmakers on Both Sides Say*, USA TODAY, Feb. 15, 1999, at A11.

82. Amy Keller, *supra* note 77. Senator Carl Levin, who has long supported the statute, has, himself, noted that the independent counsel process has become "hopelessly politicized." *Id.* Similarly, Stephen Saltzburg, who chairs the Independent Counsel Act Task Force for the American Bar Association, has stated, "[t]he statute invites political influence and political game-playing all the time." *Id.* Mr. Saltzburg continued by noting, "[m]y sense is that most members of the task force would vote to abolish the statute if they could." *Id.*

83. S. 581 would place a limit on the number of years a judge could serve on the special division of the United States Court of Appeals for the District of Columbia, which appoints the independent counsels and would also require that regulations be created regarding the procedures for such appointments by the special division. S. 581, 105th Cong. (1997). S. 2075 would establish a process for expedited review of claims of executive privilege during an independent counsel investigation. S. 2075, 105th Cong. (1998). S. 1065 would include the alleged violation of various election laws by covered persons as a trigger for a preliminary investigation by the Attorney General and would also provide, under some circumstances, that Congress could petition the court for appointment of an independent counsel. S. 1065, 105th Cong. (1997). H.R. 117 would limit those allegations in response to which the Attorney General is required to conduct an initial investigations to charges of federal felonies or federal misdemeanors committed while in office. This bill would also change the standard used by the Attorney General in determining lack of intent from clear and convincing evidence to a preponderance of the evidence. The bill also provides for several other modifications to the statute. H.R. 117, 105th Cong. (1997). H.R. 139 would allow the Attorney General to issue subpoenas as part of a preliminary investigation. H.R. 139, 105th Cong. (1997). In addition, the bill would limit funding for office expenditures to two years, unless re-authorized by Congress and prohibit an independent counsel from engaging in other legal work while the investigation is ongoing. *Id.* H.R. 692 would expand those individuals covered by the statute to include employees of the Justice Department. H.R. 692, 105th Cong. (1997). H.R. 3464 would grant the Attorney General subpoena power for preliminary investigations, reduce those executive offices to which the statute applies, limit the alleged crimes which can trigger an investigation, modify the standard for requesting the appointment of an independent counsel from the current reasonable grounds to "substantial grounds to believe that further investigation is warranted," establish a two-year term (renewable under certain circumstances) for independent counsels and prohibit independent counsels from engaging in other employment during their investigation. H.R. 3464, 105th Cong. (1998).

84. Congressman Wexler is a Democrat from Florida serving his first term. He is also a member of the House Judiciary Committee. The bill offered by Congressman Wexler has been designated H.R. 3464.

the executive offices to which the statute applies; (3) limiting the alleged crimes that can trigger an investigation; (4) modifying the standard for requesting the appointment of an independent counsel from the current reasonable grounds to "substantial grounds to believe that further investigation is warranted"; (5) establishing a two-year term (renewable under certain circumstances) for an independent counsel; and, (6) prohibiting an independent counsel from engaging in other employment during an investigation.⁸⁵

Congressman Wexler's bill proposed comprehensive revisions to the independent counsel statute attempted to rectify most of the major issues that have been identified as problematic within the legal and political communities.⁸⁶ However, the bill will not be re-introduced this year because "Congressman Wexler is concerned about the excesses of the independent counsel and likely will vote against reauthorization."⁸⁷ One issue that was not addressed by the Wexler bill is the costs incurred for investigations by independent counsels, an issue often highlighted by the media and periodically by members of Congress.⁸⁸ As noted above, recent figures place the total cost of independent counsel investigations over the life of the statute at \$136 million and climbing.⁸⁹ Although this is certainly a significant sum of money, it seems less extraordinary when compared to outlays for other federal government activities. For example, the 1998 appropriation for the Department of Justice approved by Congress was \$17.5 billion.⁹⁰ Moreover, when compared with other issues raised by the independent counsel statute, the expenditures made by independent counsels in the course of their investigations could, perhaps, be justified if the statute was accomplishing its goals.

What should be a major issue in the minds of legislators as they wrestle with the question of whether to renew the statute, renew it with modifications, or abandon it completely is whether the law is having its intended effect. According to a statement issued by Senator Carl Levin when the act's renewal was being considered in 1987, the statute "restores public confidence in our criminal justice system[,] . . . and it furthers the Framers' goal of instilling appropriate checks and balances

85. See H.R. 3464. There were ten co-sponsors of the bill. *Id.*

86. See generally, Sixty-seventh Judicial Conference of the Fourth Circuit, *The Independent Counsel Process: Is It Broken and How Should It Be Fixed?*, *supra* note 2.

87. Telephone Interview with Eric Johnson, Deputy Chief of Staff for Congressman Robert Wexler (Jan. 22, 1999).

88. See, e.g., Shepard, *supra* note 69, at A10.

89. Stoddard, *supra* note 6, at 1 (citing Rep. Jay Dickey).

90. 1998 Federal Spending Bills; Commerce-Justice-State Bills Cleared, FACTS ON FILE WORLD NEWS DIGEST, Nov. 20, 1997, at 844 A3.

within the federal government.⁹¹ The Ethics in Government Act of 1978, which includes the independent counsel statute, was enacted with the aim of rehabilitating citizens' faith in political officials and the federal government.⁹² Has that faith been rekindled? In a 1997 poll, forty-five percent of those surveyed viewed the independent counsel law as "a good thing," while seven percent viewed the statute as "a bad thing."⁹³ However, it is worth noting that the same poll found that almost fifty percent of the respondents did not know enough about the law to form an opinion.⁹⁴ A year later, a December 1998 survey suggested a higher level of public support with eighty-two percent of poll respondents indicating that they believed the independent counsel statute should be retained; however, a majority thought the law needed modification.⁹⁵

A similar survey of professionals who would, as a group, be more familiar with the legal aspects of the statute revealed a different perspective. A 1998 poll of lawyers conducted for the *National Law Journal* revealed that twenty-seven percent of the attorneys responding believed the independent counsel statute should be allowed to expire.⁹⁶ Sixty percent of the survey respondents thought the law should be amended to limit the scope of independent counsel investigations.⁹⁷ Only eight percent of the attorneys surveyed believed that the statute should be reenacted in its current form.⁹⁸

At this point, the independent counsel statute is viewed, by both

91. Senator Carl Levin with Elise J. Bean, *A Symposium on Special Prosecutions and the Role of the Independent Counsel: The Independent Counsel Statute: A Matter of Public Confidence and Constitutional Balance*, 16 HOFSTRA L. REV. 11, 22 (1987).

92. Kelly & McEntee, *supra* note 47, at 566 n.13.

93. These findings are taken from a USA Today/CNN/Gallup Poll conducted Oct. 27-29, 1997 which was calculated to have a three percent margin of error. Susan Page, *Independent Counsel Law: Parties Switch Sides But Both Say It May Be Time For a Change*, USA TODAY, Nov. 14, 1997, at 4A.

94. *Id.*

95. Richard Willing, *Independent Counsel May Become Extinct*, USA TODAY, Feb. 12, 1999, at 7A.

96. Marcia Coyle & Harvey Berkman, *Bar to Starr: Clinton Lied, But So What*, THE NATIONAL LAW JOURNAL, June 29, 1998, at A1. A national survey of 406 lawyers (114 Democrats, 139 Republicans and 153 Independents) found that lawyers were divided on their views regarding the independent counsel statute. *Id.* The poll asked, "Which of the following statements comes closest to your point of view with regard to the independent counsel law?" *Id.* The responses were as follows: the law should be renewed in its present form after it expires, 8%; after the law expires, it should not be renewed, 27%; the law should be modified to ensure counsels remain more focused on their original mandate, 60%; and, not sure, 5%. *Id.* The poll was conducted by Mason-Dixon Political/Media Research and had a five percent margin of error. *Id.* The attorneys were surveyed June 3-11, 1998. *Id.*

97. *Id.*

98. *Id.*

legislators and the public, as just another political tool that the party not in control of the White House can employ to discredit the President for a political advantage.⁹⁹ As noted by Professor Julie O'Sullivan:

[O]ne of the 'lessons' of the operation of the [independent counsel] statute . . . is that in cases of potentially great political import it creates partisan incentives to generate the very 'appearance' problems that the statute sought to erase. As a consequence, although the [independent counsel] mechanism in general may enjoy public support, the political dynamics of the statute mean that in the high-profile cases at the heart of the statute partisans will seek to destroy that which the statute is designed to further: public confidence in the integrity of the results of the independent investigation.¹⁰⁰

In the most important cases, the same reasons offered for why a particular charge or accusation is "too politically charged" to allow the Justice Department to handle the investigation virtually assure that the conclusions of any independent counsel will be challenged by those with differing political motivations.¹⁰¹ In its current form and application, the independent counsel statute has had the unintended effect of diminishing public confidence in the independent, nonpartisan nature of justice meted out by the federal government.¹⁰² Ultimately, laws are designed to protect society. When a law no longer serves this purpose, but rather damages the general perception of the society, that law should be abolished.

Archibald Cox, the former Watergate Special Prosecutor, has noted, "[t]he pressures, the tensions of divided loyalty are too much for any man, and as honorable and conscientious as an individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is absolutely essential."¹⁰³ The point is well taken, but abolition of the independ-

99. David Jackson, *White House Keeping Heat on Starr for Inquiry Tactics; Polls Show Low Public Opinion of Investigation*, THE DALLAS MORNING NEWS, Mar. 19, 1998, at A1. A March 17, 1998, CBS poll found that only thirty-one percent of those responding believed Kenneth Starr's investigation of President Clinton to be "impartial" compared to fifty-eight percent who found Mr. Starr's behavior to be "partisan." Another CBS poll, taken in May of 1998, found that fifty-two percent of those surveyed considered Mr. Starr's inquiry to be partisan. Elaine Sciolino, *Softening the Image of Kenneth Starr*, THE NEW YORK TIMES, May 25, 1998, at A1.

100. Julie O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463, 464 (1996).

101. *Id.* at 474.

102. Anderson, *supra* note 74, at 15; *Rethink Independent Counsels*, THE DESERT NEWS (Salt Lake City, UT), Apr. 16, 1998, at A14.

103. Eugene Gressman, *A Symposium on Special Prosecutions and the Role of the Independent Counsel: Introduction*, 16 HOFSTRA L. REV. 1, 3 (1987), (citing *Removing Politics From the Administration of Justice: Hearings on S. 2803 and S. 2978 Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary*, 94th Cong. 2d Sess. 200 (1974)).

ent counsel would by no means free the President and other high-ranking government officials from accountability for their actions or from the appointment of special prosecutors from outside of the Department of Justice. As Professor O'Sullivan¹⁰⁴ suggests, career prosecutors within the Justice Department are certainly competent to pursue allegations against government officials in most cases.¹⁰⁵ If conflict of interest is an issue in a particular situation, the Attorney General may appoint a private attorney to serve as a special prosecutor.¹⁰⁶ Such special prosecutors were employed by Attorneys General to investigate Watergate,¹⁰⁷ the Whitewater land transactions,¹⁰⁸ and several other allegations.¹⁰⁹ There is even some evidence to suggest that a special prosecutor appointed by the Attorney General is equally likely to fulfill the expectations of the public and the criminal justice system as is an independent counsel.¹¹⁰ Professor O'Sullivan acknowledges that dealing with allegations against high government officials in this manner does not provide a statutory guarantee that the President will not dismiss a special prosecutor who is on the verge of seriously damaging the administration, but she contends the public uproar which would accompany any such executive maneuver would ensure that justice is ultimately served.¹¹¹

As illustrated by the Watergate scandal, Congress also has the authority to investigate alleged wrongdoing by executive branch officials;

104. Professor O'Sullivan is a member of the faculty at Georgetown University Law Center and is viewed as the preeminent "theoretical critic" of the independent counsel law. She also served on the staffs of special prosecutor Robert Fiske and independent counsel Kenneth Starr. Anderson, *supra* note 74, at 15.

105. Anderson, *supra* note 74, at 15. Professor O'Sullivan contends that the statute provides an independent counsel "an excess of time, means and incentive to pursue a far greater number of people, over a wider investigatory landscape, with less justification, and at greater human, financial and institutional cost than is reasonably necessary to promote the reality, or appearance, of evenhanded justice." *Id.*

106. *Id.*

107. Archibald Cox served as the special prosecutor for the Watergate investigation involving President Nixon. *Id.*

108. Robert Fiske, Jr. was appointed as a special prosecutor to investigate land transactions involving President Clinton and Mrs. Clinton. *Id.*

109. Former Attorney General William Barr arranged for people outside of the executive branch to investigate allegations that raised conflict of interest issues or those that were particularly sensitive in a political sense. Sixty-seventh Judicial Conference of the Fourth Circuit, *The Independent Counsel Process, Is It Broken and How Should It Be Fixed?*, *supra* note 2, at 1532-33. Former Attorney General Griffin Bell appointed Paul J. Curren as "special counsel" to investigate possible criminal conduct on the part of President Jimmy Carter and his brother Billy. O'Sullivan, *supra* note 100, at 506.

110. O'Sullivan, *supra* note 100, at 505 (citing Katy J. Harriger, INDEPENDENT JUSTICE: THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS 38 (1992)).

111. Anderson, *supra* note 74, at 15.

although, given the often partisan nature of the inquiries, the findings of such investigations may be open to question.¹¹² However, the Watergate Committee stands as an example of how partisanship can be successfully checked during a congressional investigation.¹¹³ Whether by appointment of a special prosecutor by the Attorney General or the initiation of a congressional investigation, mechanisms currently exist, separate from the independent counsel statute, to investigate possible misconduct by officials within the executive branch of the national government.

In short, our democracy is not so fragile that a President would ever be able to stymie an investigation into serious allegations of wrongdoing on his part or on the part of others within the administration. Given the current state of politics, it seems unfathomable that members of Congress would allow criminal charges against the President or another member of the executive branch to be shelved absent anything less than a full and thorough investigation.

As part of his dissenting opinion in *Morrison*, Justice Scalia observed that it would be extremely difficult for a member of Congress to vote against something called the Ethics in Government Act.¹¹⁴ Although Justice Scalia's observation may be an accurate assessment of the nature of politics, it may be considerably easier for a legislator to simply not vote at all and allow the independent counsel law to lapse. Such inaction would ultimately be in the best interest of the nation. As noble as was the intent for creating the office of the independent counsel, the unintended consequences of the statute far outweigh any benefit it may offer today.

Joseph E. Haviland

112. O'Sullivan, *supra* note 100, at 470.

113. *Id.*

114. *Morrison v. Olson*, 487 U.S. 654, 733 (Scalia, J., dissenting).